

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOUG AVERY)	
Claimant)	
)	
VS.)	
)	
MELLIES PRODUCTS INC.)	
Respondent)	Docket No. 217,871
)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge Bryce D. Benedict's Award dated July 3, 2001. The Board heard oral argument on January 23, 2002, by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Jeff K. Cooper. Respondent and its insurance carrier appeared by their attorney, Heather Nye.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge determined claimant was permanently and totally disabled as a result of his work-related injury.

The issues raised by respondent on review include the nature and extent of disability. Respondent specifically argues claimant is neither permanently and totally disabled nor entitled to a work disability. Respondent further contends claimant suffered an intervening accident and is not entitled to future medical benefits.

Claimant argues the Administrative Law Judge's Award should be affirmed in all respects.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the parties' stipulations and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Administrative Law Judge has set out in his Award detailed and accurate findings of fact and conclusions of law supported by the record. The Award specifically addresses the issues respondent raises on review to the Board. There is no need to reiterate those findings and conclusions in this Order. Therefore, the Board adopts those findings and conclusions as its own as if specifically set forth in this Order and affirms the Administrative Law Judge's decision.

Claimant's job required him to lift cylinder blocks weighing approximately 100 pounds as well as other parts. Claimant welded pieces together which required him to work bent over and in awkward positions. Claimant began working for respondent in 1989 and had been doing the same job since he was hired.

Claimant had a history of intermittent problems with back pain which would resolve after chiropractic treatment. Claimant testified he again began to experience back pain in the latter part of June 1996 when he would bend over in the course of his job duties. On July 11, 1996, the pain worsened to the point claimant could no longer work and sought treatment.

Claimant sought treatment from not only his personal physician but also was later provided authorized treatment as a result of a preliminary hearing. The treatment claimant received consisted of physical therapy, medications including injections into the sacroiliac joints and a TENS unit for the pain.

Diagnostic studies which included an MRI, CT scan and myelogram revealed degenerative disk disease and mild bulging but no herniation or significant compression of nerves. Accordingly, conservative treatment was recommended and claimant was released to return to light-duty work.

Claimant attempted to return to work but the pain in his back continued to prevent him from working. The respondent reduced the hours claimant was required to work and over the course of several months the claimant made numerous attempts to work. However, claimant's back pain prevented him from working even the reduced hours. Claimant was no longer able to physically perform his job. He informed respondent and stopped working.

Claimant began receiving social security disability benefits in October or November 2000, which were backdated to September 1999.

Claimant sought additional medical treatment consisting of back surgery which was denied but as the Administrative Law Judge candidly admits such denial was incorrectly based upon a determination the need for additional treatment was not causally related to the accident. It should be noted Drs. John A. Lynch, P. Brent Koprivica and Kris Lewonoski all recommended back surgery at that time.

The Administrative Law Judge determined and the Board agrees the most significant medical evidence was provided by Dr. Lewonoski. When claimant was unable to secure treatment from respondent he had sought treatment with Dr. Lewonoski in March 1999. Dr. Lewonoski ordered a discogram of claimant's back. The discogram revealed claimant had a large annular tear at L5-S1. This finding was especially significant because the doctor testified the previous diagnostic tests performed on claimant's back would not have revealed the tear.

Moreover, the doctor opined the probable cause of the tear occurred with the onset of the severe pain in July 1996. This corresponds with claimant's testimony which indicated after that time his back pain never significantly subsided even after he quit working.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows: "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993), held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

Dr. Koprivica opined claimant was incapable of employment. Because claimant was unable to tolerate the pain when he attempted to work four hours a day, three days a week, Dr. Koprivica restricted claimant to ten hours per week of work. This restriction indicates the doctor was of the opinion claimant was not capable of performing any type of work that would require him to work eight hours a day, five days a week. This opinion is corroborated by Mr. Monty Longacre, the only vocational expert to testify in this matter, who agreed that Dr. Koprivica's restrictions would render claimant unemployable.

The Board is not unmindful of Dr. Sloo's contrary opinion that claimant was capable of employment. However, Dr. Sloo's opinion discounts the claimant's testimony that following the onset of severe pain, there has been no relief. As noted by the Administrative Law Judge the claimant was described as a dependable, excellent employee who ultimately was unable to tolerate even light-duty work. Moreover, the Administrative Law Judge further

noted the worsening of claimant's condition was the result of an injury that had not been appropriately treated for a year and a half.

The Board specifically agrees the last restrictions imposed by Dr. Koprivica are the most appropriate. Those restrictions limited claimant to employment of no more than ten hours a week and render claimant realistically unemployable. Therefore, the Board finds, pursuant to K.S.A. 44-510c(a)(2), that claimant is permanently and totally disabled at this time.

In summation, the evidence establishes claimant suffered a work-related accident in July 1996 which was not accurately diagnosed until the discogram on March 31, 1999. As a result of the injury claimant suffered debilitating pain which ultimately rendered him incapable of substantial and gainful employment. The Administrative Law Judge determined and the Board agrees that there was no intervening accident. Because claimant was denied additional treatment, the case was tried to final award. As determined by the Administrative Law Judge the issue of future medical, including whether claimant would benefit from the previously recommended surgery, is subject to proper application and hearing.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated July 3, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Heather Nye, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director